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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1974

No. 74-4

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SLADE GORTON,
Attorney General.

EDWARD B. MACKIE,
Deputy Attorney General,
Temple of Justice,
Olympia, Washington 98504
(206) 753-6537
Counsel for Petitioner.

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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Olympia, Washington 98504
(206) 753-6207
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner State of Washington respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 30, 1974. The opinion, which is included in the Appendix, pages 15-16, has not yet been published in the Federal Reporter.

OPINIONS BELOW

This proceeding originated in the United States District Court for Western Washington by the filing

of a complaint for declaratory judgment on August 20, 1971. The jurisdiction of the United States District Court was invoked pursuant to 28 U.S.C. 1345 by virtue of the fact that the United States government was the plaintiff in the action. The United States District Court for Western Washington, following the trial of the action, entered an order on January 31, 1973 (see Appendix, pages 17-21) concluding that the Puyallup Indian Reservation had been extinguished and therefore no longer existed in the State of Washington. The United States Court of Appeals for the Ninth Circuit on April 30, 1973, entered an opinion reversing the trial court and concluding that the Puyallup Indian Reservation had never been extinguished and therefore continues to exist, comprised of approximately 18,000 acres in the State of Washington including part of the second largest city in the State of Washington. The Ninth Circuit conclusion is in conflict with the decision of the Washington State Supreme Court in *Dept. of Game, et al. v. Puyallup Tribe, Inc.*, 70 Wn. 2d 245 at 253, 422 P. 2d 754 (1967).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., § 1254 (1).

QUESTION PRESENTED FOR REVIEW

Whether the Puyallup Indian Reservation in the State of Washington which was created by the

Treaty of Medicine Creek and Presidential Executive Orders issued in 1857 and 1873 has been abolished and therefore no longer exists as an Indian reservation.

TREATY AND STATUTORY PROVISIONS INVOLVED

The Treaty of Medicine Creek was executed on December 26, 1854, between the United States and representatives of the various Indian tribes in Western Washington including the Puyallup Indians. The treaty is reported in 10 Stat. 1132, the pertinent provisions thereof being Articles II and VI, which are set forth in the Appendix, page 22-23. Under the provisions of the treaty, the reservation which was established for the Puyallup Indians was changed by Presidential Executive Orders dated January 20, 1857 and September 6, 1873. Those Executive Orders are cited in *Indian Affairs, Laws and Treaties*, Kappler (1904) pages 1919, 1922 and 1923.

The State of Washington, after being admitted to the Union in 1889, enacted Laws of 1890, pages 499-501, relating to the Puyallup Indian Reservation. (The statute is quoted in its entirety in Appendix at pages 24-26.) That state act provided for the alienation of land within the Puyallup Reservation by the Indian allottees with the state act to become effective when Congress consented to the removal of the treaty restrictions on alienation.

Thereafter, the United States Congress in 1893 enacted 27 Stat. 612 at 633, 634 (quoted in Appendix, pages 27 to 29). The act provided for a three-member commission appointed by the President to select and appraise property within the Puyallup Reservation and further provided for the sale of lands within the reservation with the approval of the Secretary of the Interior, and specifically provided:

> " * * * which deeds shall operate as a complete conveyance of the land upon the full payment of the purchase money; * * * *Provided*, That the portion of the agency tract selected for sale shall be platted into streets and lots as an addition to the City of Tacoma, * * * *And provided further*, That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of the passage of this act * * * "

Subsequently, in 1904 the United States Congress enacted the Cushman Act, 33 Stat. 565, which provided:

> "That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seventh Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation 'for a period of ten years from the date of the passage' thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having

been made without any restrictions upon the power of the allottee to alienate his land."

STATEMENT OF FACTS

The original Puyallup Indian Reservation was established pursuant to the terms of the Treaty of Medicine Creek, 10 Stat. 1132, in the Washington Territory. The boundaries of the reservation were subsequently modified by an Executive Order of President Franklin Pierce dated January 20, 1857, and by President Grant on September 6, 1873, *supra.* In 1884, the United States Congress permitted the allotment of lands which were included within the Puyallup Indian Reservation. 23 Stat. 76, 88-89. The State of Washington was admitted to the Union in 1889, and in 1890 the state legislature passed an act removing all restrictions on the alienation of lands allotted to the Puyallup Indians, *subject to Congressional approval* (RCW 64.20.010, quoted in Appendix, page 25.) Pursuant to a Congressional enactment, 26 Stat. 336, 354, a three-man commission was appointed in 1890 to study the nature of land title within the Puyallup Reservation and to make recommendations to the Secretary of Interior concerning the future disposition of that land. In light of the inconclusive nature of an earlier Puyallup commission report dated March 11, 1891, Congress on March 3, 1893, enacted the Puyallup Allotment Act, 27 Stat. 612 at 633 (quoted in Appendix, pages 27-29). The act permitted the commis-

sion to alienate lands without the imposition of any trust. The only lands which were subject to a trust were those lands allotted to Indians who in turn would not have the power of alienation for a period of ten years. As of January 19, 1904, all of the lands, except approximately 36 acres of the 18,000, had been allotted under the 1893 act. In response to questions as to the legal effect of the ten-year prohibition on alienation under the 1893 act for Indian allottees, Congress enacted the Cushman Act, 33 Stat. 565, in 1904 (quoted on page 4), making express Congressional consent to the removal of all restrictions on alienation.

The Cushman Act reaffirmed the Congressional consent to the alienation of lands on the Puyallup Reservation and was thus a clear confirmation of the state's acceptance of jurisdiction provided in the state 1890 enactment (quoted in the Appendix, pages 24-26).

The lands included within the area now designated by the Ninth Circuit Court of Appeals as constituting the Puyallup Reservation have been subject to state jurisdiction since the effective dates of the Congressional consent to the alienation of land and their removal from their prior status as an Indian reservation. See, *United States v. Kopp*, 110 Fed. 160 (U.S.D.C., Western Wash., 1901); and, *State v. Smokalem*, 37 Wash. 91, 79 Pac. 603 (1905). The area in question has lost its characteristics as "Indian country" or reservation and now comprises an in-

tegral part of the city of Tacoma, the second largest city in the State of Washington and the surrounding urban and industrial areas.

REASONS FOR GRANTING THE WRIT

The Washington State Departments of Game and Fisheries in 1963 commenced an action against the Puyallup Tribe, et al. to determine the nature and extent, if any, of treaty fishing rights by the Puyallup Indians. That case has twice been reviewed by this Court, 391 U.S. 392 (1968), and 414 U.S. 44 (1973). The Indian fishing activities in that case were considered to be "off reservation" fishing activities by both the state courts and by this Court. Yet, a substantial portion of those Indian fishing activities occurred within the boundaries of what has now been declared by the Ninth Circuit Court of Appeals to constitute the Puyallup Reservation.

The Washington State Supreme Court in *Department of Game v. Puyallup Tribe*, 70 Wn. 2d 245, 253, 422 P. 2d 754 (1967), affirmed the conclusion of the trial court that the Puyallup Indian Reservation had been terminated and no longer existed in the State of Washington. This Court in reviewing that decision of the Washington State Supreme Court, while specifically reserving a ruling on the question of whether the Puyallup Indian Reservation exists, did not reverse the state court conclusion that no reservation exists. 391 U.S. 392, *supra*, at 394, n. 1. The Ninth Circuit Court decision, therefore,

is in conflict with the most recent decision by the highest court of the State of Washington on the reservation question. In *Satiacum v. Washington*, 414 U.S. 1, 38 L. ed 2d 1, 94 S. Ct. ..... (1973), the per curiam opinion indicated that in that proceeding the Supreme Court of Washington had unnecessarily addressed and determined the federal question of whether the Puyallup Reservation had ceased to exist.

We further believe that the Ninth Circuit Court of Appeals has misconstrued the decision rendered by this Court in *Mattz v. Arnett*, 412 U.S. 481, 37 L. ed 2d 92, 93 S. Ct. ..... (1973). This Court in concluding in *Mattz, supra*, that the Klamath River Reservation in California had not been terminated examined:

(1) The Congressional history, not only of the specific act (1892 Klamath Act, 27 Stat. 52), but also previous Congressional proposals to specifically "abolish" the reservation.

(2) The 1892 Klamath Act, *supra*, and its relationship to the 1887 General Allotment Act, 24 Stat. 388.

(3) Subsequent Congressional Acts reflecting continued Congressional recognition of the Klamath River Reservation. All of these elements were considered by this Court in concluding that the Klamath River Reservation had not been terminated. There

are significant differences which warrant a contra conclusion re the Puyallup Reservation.

This Court observed in *Mattz*, *supra*, at 500, 502, that eight Congressional bills were introduced during the period of 1879-1892 and

> "Each bill would have 'abolished' the reservation and would have made the land subject to homestead and preemption of entry," (*supra*, 501)

This Court after having extensively considered the legislative history of unsuccessful attempts to specifically "abolish" the Klamath River Reservation, stated, *supra*, at 502:

> "It is against this background of repeated legislative efforts to terminate the reservation, and to avoid allotting reservation lands to the Indians, that the 1892 Act was introduced."

Furthermore, the Court observed that the legislative history of the enactment of the 1892 Klamath Act shows that the United States Senate specifically deleted the reference in the original House Bill to "the removal of the Indians from the land" and substituted a provision that land should be allotted to the Indians under the General Allotment Act of 1887 (*Mattz*, *supra*, at 503).

It appears that this Court was strongly influenced by this legislative history reflecting a number of attempts to specifically "abolish" the Klamath River Reservation. The Court stated (*Mattz*, *supra*, at 504):

> " * * * More significantly, throughout the period from 1871-1892, numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms. Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the 1892 Act. *This being so, we are not inclined to infer an intent to terminate the reservation.* * * * * " (Double emphasis supplied)

The reference to "This being so" underlined above clearly emphasizes the importance of the prior legislative history.

Now by way of contrast, the State of Washington, after being admitted to the Union in 1889, enacted RCW 64.20.010 (quoted in Appendix, page 25), specifically recognizing the right of the Puyallup Indians to alienate land held by them *at such* time as the United States would remove the restrictions *on such alienation.* In 1893 Congress considered the removal of the restrictions on alienation and enacted 27 Stat. 612 at 633. The discussions in the Congressional Record on this provision indicate the only "problem" relative to the legislation was that some individuals had previously acquired secret leases from the Puyallup Indians. Under the terms of those leases, the lessee would receive a conveyance of the property when the restrictions on the alienation were removed. See, Volume 24, Congressional Record, 42nd Congress, pp. 2379-80, March 2, 1893, United States Senate. Other comments relating to the Puyallup in

the Congressional Record, *supra*, at pages 2068, 2070, 2136, 2137, 2389 and 2390, cannot be construed as indicating any Congressional consideration and rejection of an abolition of the reservation.

Subsequently in 1904, Congress enacted the Cushman Act, 33 Stat. 565. The Congressional Record of the 58th Congress, Volume 38, at pp. 2605-2607, contains extensive material relating to the 1904 Cushman Act, including the following.

Senator Cushman explained that the general purpose of the legislation was to clarify the 1893 act to make it clear that the alienation permitted under that act was effective and to make express Congressional consent to the removal of all restrictions on alienation. The language of the 1893 act which prohibited alienation by Indians for a period of ten years had created problems in obtaining title insurance for transfers after the ten-year period.

Two letters from W. A. Jones, Commissioner of Indian Affairs, which were inserted in the Congressional Record make clear that there was no Congressional intention to continue a Puyallup Reservation. The first letter was to the Honorable A. G. Foster of the United States Senate dated November 18, 1903, which stated in part:

> " * * * Neither this office nor the department is now exercising any control whatever over the sale of Puyallup allotted lands. The Indians are left to dispose of the same, if they

so desire as they see fit. * * * " (38 Congressional Record 2608)

The second was addressed to the Secretary of Interior dated December 19, 1903, which stated in part:

> "Under the provisions of the treaties referred to, the restrictions upon the sale and conveyance of these lands, and upon their taxation, etc., were to continue in force until a state constitution embracing such lands within its boundaries should be formed and the legislature thereof should remove the restrictions with the consent of Congress. As indicated above, the state first removed the restrictions in the year 1890, and in 1893 Congress passed what is known as the Puyallup Act, containing the provision above noted, intending, as it would seem, to remove the restrictions fully and completely upon the sale of Puyallup allotted lands by the Indians and true owners thereof.
>
> "This office does not see any objection to the passage of the bill under consideration. It is not seen that it can do the Indians and true owners of these unsold allotments any harm or injury. Should it become law, it would certainly be clear to all concerned that the government thereby gives its absolute, full, and complete consent to the removal of the restrictions mentioned."

This Court in *Mattz, supra,* concluded that the 1892 Klamath Act (27 Stat. 52) was designed to tie into the 1887 General Allotment Act (24 Stat. 388). The Court observed, *supra,* at 496:

> "Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all of the lands had been

> allocated and the *trust expired*, the reservation could be abolished." (Emphasis supplied)

It is clear that the Klamath Reservation allotments were sold subject to the provisions of the trust provided for under the 1887 act. In contrast, the allotments which were sold from the Puyallup Reservation were not imposed with such a trust.

> This Court stated in *Mattz, supra*, at 505, "Finally, our conclusion that the 1892 Act did not terminate the Klamath Reservation is reenforced by repeated recognition of reservation status of the land after 1892 by the Department of Interior and by Congress."

This is consistent with the approach taken by this Court in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 7 L. ed 2d 346, 82 S. Ct. 424 (1962), in which the Court recognized and gave weight to subsequent Congressional recognition of the continuation of the diminished Colville Indian Reservation.

The Supreme Court noted two specific references to the Klamath River Reservation in the *Mattz* decision, *supra*. Those specific statutes are:

> 56 Stat. 1081 (1942), Congress made specific reference to the "Klamath River Reservation." Subsequently in 1958, in 72 Stat. 121, Congress in listing Indian reservations included "Klamath River, California."

In contrast, we do not find any Congressional references to the Puyallup *Reservation* following the 1904 act, *supra*. Acts in which we find reference to

Puyallup but not "Puyallup Reservation" are as follows:

> 34 Stat. 1015 at 1050 (1907); 45 Stat. 378 (1928); 46 Stat. 1526 (1931); 50 Stat. 564 at 587 (1937); 52 Stat. 291 at 314 (1938); 53 Stat. 1405 (1939); and 56 Stat. 1040 (1942).

Congress has not since the 1904 Cushman Act made reference to nor recognized the continuing existence of the Puyallup Reservation. This is distinctly in contrast to the subsequent explicit Congressional recognition of the Klamath River Reservation referred to in the *Mattz* decision, *supra*.

CONCLUSION

The Petitioner respectfully requests on the basis of this petition that the Court grant the petition for certiorari.

Respectfully submitted,

SLADE GORTON,
Attorney General,

EDWARD B. MACKIE,
Deputy Attorney General,
Attorneys for Petitioner
State of Washington

APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*,
v.
STATE OF WASHINGTON, *Appellee*.

No. 73-1793
OPINION

Appeal from the United States District Court
Western District of Washington

Before: KOELSCH, HUFSTEDLER and KILKENNY, Circuit Judges. PER CURIAM:

PER CURIAM:

This appeal presents for decision, a contention under which the appellee challenges the continued existence of the Puyallup Indian Reservation[1] and, as a consequence, the right of the Puyallup Tribe of Indians to fish, free from state interference, on that part of the Puyallup River lying within the Reservation. This is a federal question, *Satiacum v. Washington*, 414 U.S. 1 (1973), which was left open in *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392, 394, n. 1 (1968), and *Moses v. Kinnear*, 490 F. 2d 21, 27-28 (CA9 1974).

After a careful study, we can find no meaningful distinction between the Cushman Act, the Act of April 28, 1904, 33 Stat. 565, and its predecessor,

[1]Created by Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132.

the Act of March 3, 1893, 27 Stat. 612, 633, the legislation upon which appellee relies, and the Act of June 17, 1892, 27 Stat. 52, construed by The Supreme Court in *Mattz v. Arnett*, 412 U.S. 481 (1973).[2] Nor can we discern a significant variance between the historical background, including the continuing congressional and agency recognition, of the Klamath River Reservation involved in *Mattz* and the historical background and continuing recognition of the questioned Puyallup Reservation. For that matter, the historical background and continuing congressional and agency recognition of the Puyallups would appear to be substantially more impressive than that of the Klamaths. Consequently, we have no alternative other than to hold that the rationale of *Mattz* is controlling and that the Puyallup Indian Reservation continues to exist.

Accordingly, the judgment of the lower court is vacated and the cause is remanded to the trial court for proceedings in conformity herewith, including the entry of an appropriate decree.

IT IS SO ORDERED.

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[2]Decided subsequent to the lower court decision in favor of the appellee.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, *Plaintiff*,	)
vs.	) No. 39-71C3
	) ORDER
THE STATE OF WASHINGTON, *Defendant.*	)

The Court, in its Memorandum Decision, has rejected the contention of the United States that the 1873 boundaries of the then existing Puyallup Indian Reservation still exist.

It has been twice held to the contrary. *United States v. Kopp*, 110 Fed. 160 (1901). Subsequent to that decision, the Supreme Court of Washington has reached the same conclusion in *Goudy v. Meath*, 38 Wn. 126, 80 Pac. 295; *State v. Smokalem*, 37 Wn. 91, 79 Pac. 603.

The Puyallup Allotment Act, 27 Stat. 63; the appointment of a commissioner to superintend sale of allotments, 30 Stat. 87; the consent of the United States to the removal of restrictions upon alienation by Puyallup Indians of their allotted lands, 33 Stat. 565; the legislative intent expressed in the House Committee Report No. 301, 58th Congress, Second Session (1904), in combination resulted in the almost total divestiture of the land within the 1873 reservation boundaries by the Indians. The Indian cemetery property was transferred by the Indian

descendants of the members of the former Puyallup Tribe to certain individual trustees. The United States no longer supervised or claimed any right to supervise the activities of the said trustees in the performance of their duties as trustees of the said Cemetery Trust. Ex. JX 19, recorded March 25, 1908, dated in 1906.

The Indian Agency property, which no longer was the site of the Indian Agency and the home of the supervisor, was to be sold and the proceeds distributed to the tribal descendants. In 1948 the channel of the Puyallup River was altered by the United States Corps of Engineers to prevent the annual devastating floods that inundated the lands in the Puyallup River Valley. This was a part of what is known as the Mud Mountain Dam project, and the Mud Mountain Dam was constructed to regulate the flow of the Puyallup River during the periods of heavy runoff caused by melting snow in the Cascade Mountains where the river and its tributaries have their source.

The bed of the river as it existed in 1873 and the river channel within the 1873 boundaries of the reservation have been materially changed by this flood control project.

The unrestricted sale of the allotted lands has resulted in the population growth and establishment of incorporated and unincorporated towns, industrial complexes, a municipal corporation titled The

Tacoma Port Authority, and many other commercial and residential areas on the land now claimed to be within the boundary of the Puyallup Indian Reservation. An examination of the relief map exhibited by the Government shows the extent of the development of the areas.

Of the 18,000 acres more or less lying within the Government's proposed reservation boundary, only approximately 30 acres are presently claimed to be land held by the United States in trust for the reorganized tribe.

The evidence supports the conclusion that the Puyallup Indian Reservation neither legally, actually, nor practically exists, nor is there any valid reason for its existence.

It is claimed by the United States that the members of the Reorganized Tribe have some claim to the present bed of the Puyallup River, and that water flowing over the riverbed flows over reservation land, and that fish swimming in the water flowing over the reservation land may be captured by the Indians without regard to state conservation laws.

It is agreed that the Puyallup River is a navigable stream and title to the land normally is in the United States, but assuming without deciding that by establishment of the reservation and subsequent alienation of the lands bordering the river are without reference to the bed of the river, and in the

instrument the Indian allottee-grantor retains some interest in the riverbed, does it follow that the combined interest of all the riparian Indian allottees who alienated their allotments but did not transfer their riparian interests revitalizes the deceased reservation so that the bed of the river is now reservation land held in trust by the United States for the benefit of the descendants of the members of the original Puyallup Tribe or the members and descendants of the members of the Reorganized Puyallup Tribe? The common sense conclusion dictates that wherever title to the land may lay, the bed of the river is not an Indian reservation, and that the State of Washington owns the fish that swim in this navigable stream and may control by its conservation laws the manner in which said fish may be taken. Assuming without deciding that the members of the Reorganized Tribe have some claim to the present bottom of the Puyallup River, it does not follow that the riverbed is the Indian Reservation. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), decided title to a riverbed but did not reestablish or revive an Indian reservation that had been extinguished by legislation. Act of 1906, 44 Stat. 148.

The Puyallup tribal right to unrestricted fishing on the waters of the Puyallup River that flowed through the 1873 reservation boundaries was extinguished when the reservation was extinguished and reorganization of the tribe did not revive it.

IT IS SO ORDERED.

DONE BY THE COURT this 31st day of January, 1973.

/s/WILLIAM N. GOODWIN
United States District Judge

TREATY OF MEDICINE CREEK — 1854

10 Stat. 1132

Article II:

> "There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their

reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them."

Article VI:

"The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor."

WASHINGTON STATE LAWS OF 1890, pp. 499-501

PUYALLUP INDIANS; MAY SELL LANDS

AN ACT enabling the Indians to sell and alien the lands of the Puyallup Indian Reservation, in the State of Washington.

WHEREAS, It was and is provided by and in the treaty made with and between the chiefs, head men and delegates of the Indian tribes (including the Puyallup tribe) and the United States of America, which treaty is dated on the 26th day of December, 1854, among other things as follows: "That the president, at his discretion, should cause the whole or any portion of the lands thereby reserved, or such land as might be selected in lieu thereof, to be surveyed into lots and assign the same to such individuals or families as are willing to avail themselves of the privilege and will locate on the same as a permanent home, on the same terms, and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable; and

"WHEREAS, It was and is provided by and in the sixth article of the treaty with the Omahas aforesaid, among other things, that said tracts of land shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force until a state constitution embracing such lands within its boundaries shall have been formed, and

the legislature of the state shall remove the restrictions, but providing that no state legislature shall remove the restrictions * * * without the consent of the congress;" and

WHEREAS, The President of the United States, on the 30th day of January, 1866, made and issued patents to the Puyallup Indians, in severalty, for the lands of said reservation, which are now of record in the proper office in Pierce county, in the State of Washington; and

WHEREAS, All the conditions now exist which said treaties contain, and which make it desirable and proper to remove the restrictions in respect to the alienation and disposition of said lands by the Indians, who now hold them in severalty: now, therefore,

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That the said Indians who now hold, or who may hereafter hold, any of the lands of any reservation, in severalty, located in this state by virtue of treaties made between them and the United States, shall have power to lease, incumber, grant and alien the same in like manner and with like effect as any other person may do under the laws of the United States and of this state, and all restrictions in reference thereto are hereby removed. [Now codified as RCW 64.20.010]

SEC. 2. All deeds, conveyances, encumbrances or tranfer[s] of any nature and kind executed by any Indian, or in any manner disposing of any land, or interest therein, shall be by deed executed in the same manner as prescribed for the execution of deeds conveying real estate, or any interest therein, except that the same shall in all cases be acknowledged before a judge of a court of record. In taking said acknowledgment, the said judge shall explain to the grantor the contents of said deed or instrument, and the effect of the signing or execution thereof, and so certify the same in the acknowledgment, and before the same shall be admitted to record shall duly examine and approve the said deed or other instrument. [Now codified as RCW 64.20.020]

SEC. 3. This act shall take effect and be in force from and after the consent to such removal of the restrictions shall have been given by the congress of the United States.

Approved March 22, 1890.

27 Stat. 612, at 633, 634:

"That the President of the United States is hereby authorized immediately after the passage of this act to appoint a commission of three persons, and not more than one of whom shall be a resident of any one State, and it shall be the duty of said commission to select and appraise such portions of the allotted lands as are not required for homes for the Indian alotees; and also that part of the agency tract, exclusive of the burying ground, not needed for school purposes, in the Puyallup Reservation, in the State of Washington, And if the Secretary of the Interior shall approve the sellections and appraisments made by said commission, the allotted lands so selected shall be sold for the benefit of the allotees, and the agency tract for the benefit of all the Indians, after due notice at public auction at not less than the appraised value for cash, or one-third cash, and the remainder on such time as the Secretary of the Interior may determine, to be secured by vendor's lien on the property sold.

"It shall be the duty of said commission, or a majority of them, to superintend the sale of said lands, ascertain who are the true owners of the allotted lands, have guardians duly appointed for the minor heirs of any deceased allottees, make deeds of the lands to the purchasers thereof, subject to the approval of the Secretary of the Interior, *which deeds shall operate as a complete conveyance of the land upon the full payment of the purchase money;* and the whole amount received for allotted lands shall be

placed in the Treasury to the credit of the Indian entitled thereto and the same shall be paid to him in such sums and at such times as the Commissioner of Indian affairs, with the approval of the Secretary of the Interior, shall direct: *Provided,* That *the portion of the agency tract selected for sale shall be platted into streets and lots as an addition to the City of Tacoma,* and sold in seperate lots, in the same manner as the allotted lands, and the amount received therefor, less the amount necessary to pay the expenses of said commission, including salaries shall be placed to the credit of the Puyallup band of Indians as a permanent school fund to be expended for their benefit: *And provided further,* That *the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years* from the date of the passage of this act and no part of the allotted land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof, and appointing said commissioners, or a majority of them, trustees to sell said land and make a deed to the purchaser thereof; and no part of the agency tract shall be sold until a majority of said Indians shall consent thereto in a written agreement, which shall also constitute said commissioners, or a majority of them, trustees to sell said land, as directed in this act, and make deeds to the purchaser for the same. The deeds executed by said commission shall not be valid until approved by the Secretary of the Interior, who is hereby directed to make all

necessary regulations to carry out the purposes of the foregoing provisions. The proceeds arising from the sale of the allotted lands shall be placed in the Treasury to the credit of the respective allottees, and the net proceeds of the agency tract, after paying the expenses of said commission in the appraisment and sale of said lands, and reimbursing the United States for the amount advanced to said commission, shall be placed in the Treasury of the United States to the credit of all said Indians, and the said sums shall draw interest at the rate of four per centum per annum, and the income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior: *Provided;* That an amount not exceeding one tenth of the principal sum may be expended for their benefit during any fiscal year, if deemed necessary by the Secretary of the Interior: *Provided further,* That the entire expense herein incurred shall be apportioned by the Secretary of the Interior pro rata between the several allottees and the owners of the tribal tract; and the Secretary of the Interior may in his discretion designate one member of said Commission to superintend the execution of any of the requirements of said Commission herein provided for.

"And the sum of twenty thousand dollars or so much hereof as may be necessary, is hereby appropriated for the purpose of defraying the expenses of said commission, to be reimbursed to the United States out of the proceeds of the sale of that portion of the agency tract, to be immediately available." (Emphasis supplied)

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-4

STATE OF WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 17-21) is not reported. The opinion of the court of appeals (Pet. App. 15-16) is reported at 496 F.2d 620.

JURISDICTION

The judgment of the court of appeals was entered April 30, 1974. The petition for a writ of certiorari was filed July 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Puyallup Indian Reservation, which was established in 1854 by the Treaty of Medicine Creek, 10 Stat. 1132, was terminated by subsequent Acts of Congress allowing the sale without restriction of much of the land within the Reservation.

TREATY AND STATUTES INVOLVED

Articles II and VI of the Treaty of Medicine Creek of December 26, 1854, 10 Stat. 1132, are set forth at Pet. App. 22-23.

The Act of March 3, 1893, 27 Stat. 612, 633-634, is set forth in pertinent part at Pet. App. 27-29.

The Act of April 28, 1904, 33 Stat. 565, is set forth at Pet. 4-5.

STATEMENT

This case was brought by the United States to resolve a dispute between it and the State of Washington as to whether the Puyallup Indian Reservation continues to exist.[1] Decision of this issue was necessary to determine the extent of the fishing rights of the Puyallup Tribe on the portion of the Puyallup River within the Reservation boundaries.

The controversy was presented to the district court on a detailed stipulated record (R. 213-264).[2] The district court, prior to this Court's decision in *Mattz* v. *Arnett*, 412 U.S. 481, held that because most of the land in the Reservation had been disposed of free of restriction, the Reservation "* * * neither legally, actually, nor practically exists" (Pet. App. 19), and that the tribal "on reservation" fishing rights were extinguished when the reservation was extinguished.

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[1] This question was specifically left undecided by this Court in *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 394 n. 1.

[2] "R" refers to the record in the court of appeals.

The court of appeals reversed, concluding that there was no meaningful distinction between the legislation and historical background in this case and the situation in *Mattz* v. *Arnett, supra.* In neither case did Congress, in allowing the sale of Indian land within a reservation, abolish the reservation; indeed, the court found the continuing congressional and agency recognition of the Puyallups "* * * to be substantially more impressive than that of the Klamaths" (Pet. App. 16). The court accordingly determined that the Puyallup Indian Reservation continues to exist (Pet. App. 15-16).

The stipulated facts essentially showed the following: The Puyallup Reservation was established by the Treaty of Medicine Creek in 1854 and its boundaries were fixed and expanded by Executive Orders of January 20, 1857, and September 6, 1873 (R. 219, 222). The Reservation as enlarged encompassed approximately 18,000 acres including a portion of the Puyallup River (R. 223).

In 1884, Congress authorized the President to survey the Reservation and to make allotments to individual Indians as he deemed advisable (R. 224; 23 Stat. 76, 88-89). Restricted patents were thereafter issued to approximately 167 Indian allottees for an area of approximately 17,463 acres (R. 225). An "Agency Reserve" was also created encompassing approximately 599 acres (R. 225). None of the patents issued included the bed of the Puyallup River (R. 225-226). No mention was made of the abolition or termination of the Reservation or of Indian fishing rights.

After Washington's admission to the Union in 1899, despite its renunciation of jurisdiction over Indian lands (R. 227), there was considerable pressure by non-Indians for land within the Reservation boundaries (R. 227-243). In 1890 a commission was established by Congress "to

visit the Puyallup Reservation" and to consider, among other things, whether restrictions should be removed from allotments to Indians (thus allowing non-Indians to purchase land within the reservation from their Indian owners). 26 Stat. 336, 354. In 1893 a second commission was established to select and sell surplus lands of the Reservation, the proceeds to become a school fund for the Tribe. 27 Stat. 612, 633. That Act also provided for the termination after 10 years of the restrictions on allotments already made to Indians *(ibid.)*. Although the two Acts opened the way for non-Indians to acquire Reservation land, neither Act purported to abolish or diminish the Reservation—despite suggestions of the Puyallup Indian agent after the first commission report that the boundaries be changed to diminish the Reservation (R. 232-237).

In 1904, by Act of April 28, 1904, 33 Stat. 565 (see Pet. 4), Congress reaffirmed the part of the 1893 Commission Act allowing restrictions on allotments to terminate after 10 years, thus eliminating title problems for purchasers of such land.

By 1920, all of the formerly allotted lands within the Reservation either had been sold for the benefit of the allotment owners, or had become the unrestricted fee property of the allotment owners (R. 249), but some tribally held land remained (R. 253).

In 1934, after passage of the Indian Reorganization Act, 48 Stat. 984, the Tribe inquired of the Department of the Interior as to its eligibility for reorganization (R.253). The Department replied that since approximately 60 acres of the Reservation remained in tribal ownership, the Tribe was eligible to reorganize under the Act *(ibid.)*. On May 13, 1936, the Secretary of the Interior approved the Constitution and bylaws of the "Puyallup Tribe of the Puyallup Reservation * * *" (R. 255).

Since the reorganization of the Puyallup Tribe, the Department of the Interior and the Department of Justice have consistently recognized that the Tribe and Reservation still exist and that the unsold lands of the Tribe are held in trust for the Tribe by the United States (R. 255, 258-260, 261-262). Congress has also recognized the Puyallup Tribe as still existing; it has incorporated the Tribe's Constitution into federal legislation, 56 Stat. 1040 (December 5, 1942); 53 Stat. 1405 (August 11, 1939); and has provided appropriations for the Tribe's benefit, *e.g.*, 34 Stat. 1015, 1050; 45 Stat. 378; 50 Stat. 564, 587; 52 Stat. 291, 314; 53 Stat. 1405-1406.

The Attorney General of the State of Washington, in 1957, in disclaiming compensation for a federal taking of a portion of the bed of the Puyallup River, stated that it was "* * * within the existing Puyallup Indian Reservation" (R. 261-262).

ARGUMENT

The most that can be pointed to in support of petitioner's argument that Congress abolished the Puyallup Reservation are Acts which permitted the allotment of reservation lands and a subsequent Act that confirmed the removal of restrictions upon allotted (but not unallotted) lands. There is nothing in any of these Acts which even remotely suggests an intention by Congress to abolish the Puyallup Reservation.[3] Peti-

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[3]The letters quoted by petitioner (Pet. 11-12) as evidence that Congress by the Act of April 28, 1904, intended to abolish the Puyallup Reservation show no more than an intent to quitclaim sales of previously allotted land within the reservation. The committee reports on the bill make this limited purpose clear. See H. Rep. No. 301, 58th Cong., 2d Sess.; S. Rep. No. 1935, 58th Cong., 2d Sess. See also *Eells* v. *Ross*, 64 Fed. 417 (C.A. 9), specifically holding that the Act of March 3, 1893, which provided for the allotment and removal of restrictions on most of the Puyallup

tioner's argument thus rests on the proposition that because most, but not all, of the Reservation land is owned by non-Indians the Reservation status itself, by implication, must fall. But this Court has repeatedly held that "* * * when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States* v. *Celestine,* 215 U.S. 278, 285; *United States* v. *Nice,* 241 U.S. 591; *Seymour* v. *Superintendent,* 368 U.S. 351, 359. This principle was reaffirmed by Congress in 18 U.S.C. 1151, which provides in its definition of Indian country:

> Except as otherwise provided in sections 1154 and 1156 of this title, *the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent,* and, including rights-of-way running through the reservation * * *. [Emphasis added.]

That sale of land within a reservation does not terminate the reservation was, of course, most recently affirmed by this Court in *Mattz* v. *Arnett, supra,* 412 U.S. at 504-505, where the Court stated that despite an act opening most of the reservation to settlement by non-Indians "* * * we are not inclined to infer an intent to terminate the reservation." When

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Reservation, did not abolish the Reservation. See also *United States* v. *Celestine, 215 U.S. 278, 287,* citing (and discussing) *Eells* with approval. Since the Act of 1904 merely confirmed the removal of restrictions already accomplished by the Act of 1893 at issue in *Eells*, that case is a strong and contemporaneous affirmance of the continued existence of the Reservation.

Congress desires to terminate a reservation it knows how to effect its desires. *Id.* at 504, n. 22. That decision governs here.

Here, as in *Mattz*, a Northwest coast fishing Tribe by treaty gave up most of its land in return for a small reservation along the mouth of a river so that it could sustain itself through fishing. In each case, the Tribe's non-Indian neighbors were anxious to obtain access to reservation land—in *Mattz* for lumbering, in this case to expand the City of Tacoma. In each, Congress chose a less extreme invasion of tribal rights than some proposed. In neither case did Congress pass a law "terminating" the reservation, "diminishing" it, or changing or abolishing its boundaries—although such proposals had been made. In each case the tribe ultimately lost ownership of most of its land, but never lost ownership of all of it and never, in any way, consented to a loss of the fishing rights incident to the Reservation boundaries. Nor did Congress specifically take, or compensate the Tribe for, any fishing rights. In sum, it is appropriate to note here, as the Court did in *Mattz*, that "Congress was fully aware of the means by which termination could be effected" *(id.* at 504), and did not choose to terminate the Reservation.

2. A word should be said about the practical consequences of the Ninth Circuit's opinion. The effect on non-Indians of living within an Indian reservation is insignificant. They are taxed by the state and its subdivisions and, except in transactions with Indians, are fully subject to state civil and criminal jurisdiction.

To the members of the Puyallup Tribe, however, the existence of their reservation means everything. It is their identification with their former lands. It evidences the fact that the United States has kept its word. More mundanely, it assures the Indians the "on reservation" fishing rights provided by their treaty, and provides them federal, rather than state, jurisdiction and assistance in many of their activities.

The Tribe's consistent assertion of these rights speaks for their continuing importance. It would be an unjust, and as we have shown, an unwarranted result to hold that in conveying to private owners most, but not all, of the land within its Reservation, the Tribe, without so intending, without compensation, and without congressional or executive consent, must be held to have disposed of valuable on-reservation fishing rights, and the governmental advantages of the Reservation itself.

3. The decision below is thus correct. There is no conflict in federal court decisions on this question. To the extent that earlier state court decisions are contrary, they are governed by the subsequent decision of the Ninth Circuit on this federal question — a question that this Court recognized in both *Puyallup Tribe* v. *Department of Game, supra,* and *Satiacum* v. *Washington,* 414 U.S. 1, as open. The issue has now been settled by the Ninth Circuit, on a complete record, in accord with this Court's decision in *Mattz* (and the Ninth Circuit's prior decision in *Eells* v. *Ross, supra*) and no further review is required.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
HARRY R. SACHSE,
Assistants to the Solicitor General.

EDMUND B. CLARK,
GEORGE R. HYDE,
Attorneys.

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